

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

**C.R. No.69 of 2015 (O&M)
Date of Decision.15.02.2019**

Kirpal Kaur

...Petitioner

Vs

Urmila Devi and another

...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. R.S. Pathania, Advocate for
Mr. R.S. Manhas, Advocate
for the petitioner.

Mr. Sunil Agnihotri, Advocate
for respondent No.1.

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AMIT RAWAL J. (ORAL)

The petitioner-defendant No.2 is in revision petition against the impugned order dated 18.12.2014 whereby the application dated 22.08.2014 submitted under Section 65 of the Indian Evidence Act for permission to prove the agreement to sell dated 29.01.2007 has been dismissed.

Learned counsel for the petitioner submitted that the respondent-plaintiff had filed the suit for possession by way of specific performance of agreement to sell dated 19.2.2008 in respect of land measuring 1 kanal 4 marlas with consequential relief of permanent injunction from changing the nature of land and creation of third party rights. The petitioner herein was arrayed as defendant No.2.

The petitioner-defendant No.2 denied execution of the agreement to sell rather submitted that she along with her mother had received a sum of ₹1 lakh from the plaintiff as loan on 29.01.2007

and writing was effected for the purpose of security on interest which was being paid by the petitioner. Plaintiff-respondent taking the benefit of the petitioner-defendant No.2 being lady and in dominating position obtained agreement dated 19.2.2008 as security for return of the loan of ₹1 lakh, thus, there was no intention of the parties to enter into agreement to sell, which has been sought to be executed in suit for specific performance. Original agreement to sell dated 29.01.2007 is in possession of the plaintiff and the application dated 29.05.2014 for production of the original document Ex.P1 was submitted but the same was dismissed by the trial Court vide order dated 12.08.2014 with the observation that the petitioner would be at liberty to adopt any procedure for production of the original agreement to sell. It is, in these circumstances, application for secondary evidence was submitted.

The respondent-plaintiff in reply did not deny execution of the agreement to sell but stated that it was in the custody of the petitioner. He submitted that once existence of the agreement to sell has not been denied, all the more reason the Court below ought to have permitted the petitioner-defendant No.2 to lead evidence by way of secondary evidence, thus, urges this Court for setting the order under challenge.

Per contra, Mr. Sunil Agnihotri, learned counsel appearing for respondent No.1 submitted that the order under challenge is perfectly legal and justified. The plaintiff emphatically denied execution of the agreement to sell or its execution, much less, possession of the same. The petitioner has failed to prove existence

and loss and therefore, cannot be permitted to fill up the lacuna in the evidence in the absence of original document by taking the aid of provisions of Section 65 of the Indian Evidence Act, thus, urges this Court for dismissal of the revision petition.

I have heard learned counsel for the parties and appraised the paper book. The order dated 12.08.2014 (Annexure P-2) granting liberty to the petitioner-defendant No.2 to take appropriate steps is not in dispute. Plaintiff has categorically pleaded execution of the agreement to sell dated 29.01.2007 prior to the agreement to sell dated 19.02.2008, which is subject matter of the suit. Once the defendant did not deny the execution but only its custody, for all the more reason the Court below ought to have allowed the application subject to the condition of existence and loss by taking into consideration aforementioned pleadings in correct perspective. The party cannot be thrown out mechanically by observing that it was a delaying tactic or an afterthought.

In view of such circumstances, the impugned order is set aside and the application for secondary evidence is allowed, subject to the condition that the petitioner-defendant No.2 will prove its existence and loss or unavailability or non-production in accordance with law only then it should be considered as secondary evidence. The revision petition is disposed of in the above terms.

(AMIT RAWAL)
JUDGE

February 15, 2019
Pankaj*

Whether Reasoned/Speaking Yes

Whether Reportable No